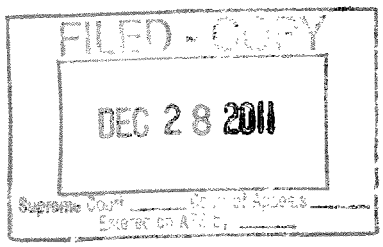
12-28-2011

Two Jinn, Inc. v. Idaho Dept. of Ins. Appellant's Reply Brief Dckt. 38759

IN THE SUPREME COURT OF THE STATE OF IDAHO

TWO JINN, INC., a California corporation duly qualified to do business in Idaho and doing business as Aladdin Bail Bonds and Anytime Bail Bonds, Petitioner-Appellant, vs. IDAHO DEPARTMENT OF INSURANCE, Respondent.	)	Supreme Court Case No. 38759



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho,
In and For the County of Ada

HONORABLE KATHRYN A. STICKLEN
Presiding Judge

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Idaho Code § 41-1042 limits the charges for a bail agent's service in the bail transaction and does not apply to the remedies available to the parties in the event of a breach of the bail bond agreement. The DOI's contrary interpretation of the statute fails to give effect to its plain language and is unreasonable. This Court should therefore reverse the DOI's Final Order on Two Jinn's request for declaratory ruling.

Throughout the proceedings before the DOI and district court, Aladdin noted that the DOI's interpretation of Section 41-1042 is illogical and internally inconsistent because it permits bail agents to contract for one remedy in the event of breach – the agreement to pay the forfeiture – but not contract for another remedy in the event of breach – the agreement to pay apprehension costs, when neither remedy is enumerated in Section 41-1042. In its brief to this Court, the DOI again neglects to explain why an agreement to reimburse for apprehension costs is precluded as non enumerated "valuable consideration" in exchange for the bail agent's service in the bail transaction yet an agreement to reimburse the amount of forfeiture – also non enumerated – is not precluded. The DOI instead responds – as it did in the district court – to arguments which Aladdin has not made, such as that the Third Paragraph is not part of the bail transaction and that it is a promissory note.

In short, Idaho Code § 41-1042's plain language does not reach the remedies to which the parties may contract in the event of a breach of the bail bond. Even if the statutory language were ambiguous, legislative history and public policy confirm a legislative intent to allow bail

agents to contract for the recovery of contingent losses, including apprehension expenses, at the time of the bail transaction. Accordingly, this Court should exercise its ultimate responsibility to construe legislative language and declare that Section 41-1042 does not preclude indemnity agreements concerning recovery of apprehension costs such as Paragraph Three of the agreement utilized by Aladdin.

1. Idaho Code § 41-1042's plain language does not preclude recovery of the breach remedy reflected in Aladdin's indemnity agreement

Section 41-1042 limits the reimbursement a bail agent may seek for services and expenses in connection with the bail transaction. The Third Paragraph of the Indemnity Agreement does not describe charges for such services and expenses. Instead, the Third Paragraph obligates the indemnitor (the criminal defendant and/or a third party guarantor) to agree to reimburse expenses that might be incurred at a later date in the event the criminal defendant breaches the bail bond agreement by failing to appear in court and it becomes necessary to apprehend and return the defendant to custody. Section 41-1042 has no application to this agreement to pay contingent recovery expenses in the event of a breach.

In arguing to the contrary, the DOI contends a bail agent can accept nothing of value in any bail transaction unless it is listed in Section 41-1042. Respondent's Brief, p. 5. The DOI then notes that the Third Paragraph is something of value accepted in the bail transaction and Section 41-1042 must necessarily prohibit Aladdin from obtaining that agreement at the time the bail is posted. *Id.* at p. 6.

Contrary to the DOI's assertion, Section 41-1042 does not apply to any "valuable consideration" that a bail agent might obtain during the bail transaction and instead plainly limits

"charges for [the bail agent's] *service* in a bail transaction." Idaho Code § 41-1042(2) (emphasis added). Contractual remedies concerning Aladdin's recourse in the event of a breach of contract are not valuable consideration charged for the bail agent's service in the bail transaction.

Aladdin has repeatedly noted the inconsistency of the DOI's position that the statute's plain terms do not apply to one unenumerated breach remedy – the agreement to reimburse the bail agent for the forfeiture – yet preclude a different unenumerated breach remedy – the agreement to reimburse for apprehension expenses. *See* A.R. p. 7 (noting that it is nonsensical to interpret I.C. § 41-1042 as permitting bail agents to contract through an indemnity agreement for the recovery of a forfeited bond but forbidding bail agents from contracting through an indemnity agreement for the recovery of apprehension costs, particularly when the statute is silent as to the types of contingent losses to which collateral may be applied); A.R. p. 60 (noting that the DOI "does not explain why bail agents can require consumers to agree to be responsible for the forfeited bond but not require the same agreement concerning reimbursement for expenses incurred in efforts to apprehend a principal that has absconded in order to have a forfeiture set aside and the bond exonerated"); A.R. p. 97 ("the statutory language does not support the conclusion that bail agents may require an indemnitor to pay the bail bond in the event of breach but may not require an indemnitor to pay investigative costs expended in order to have the forfeiture of the bail bond set aside, particularly where neither expense is an enumerated charge in Section 41-1042"); C.R. p. 19 (noting that the DOI's "interpretation is internally inconsistent as neither the promise to pay the bail bond in the event of forfeiture nor the promise to pay investigative costs is enumerated in Section 41-1042 as an allowable charge"); C.R. p. 49 (same); C.R. p. 68 (same); C.R. 116 (noting the DOI again failed to explain how a promise to pay

apprehension costs in the event of a breach constitutes "valuable consideration" prohibited by the statute while the promise to pay the face amount of the bond in the event of breach does not).

In its current brief, the DOI again fails to explain how Section 41-1042 can be read to limit some but not all breach remedies in its Respondent's Brief to this Court. Instead, the DOI responds to an argument Aladdin has not made, contending "Aladdin argues that the Third Paragraph is not a part of the 'bail transaction.' *See*, Appellant's Opening Brief at 7." Respondent's Brief, p. 9. In the cited portion of Aladdin's brief, Aladdin explained that the Third Paragraph is not a charge for the bail agent's service in the bail transaction. It did not – and has not – argued that Paragraph Three is not part of the bail transaction.

Indeed, Aladdin previously replied to this same contention in its reply to the DOI's brief in the district court:

> The Respondent's Brief is largely devoted to its argument that the Indemnity Agreement is part of the bail transaction. This is irrelevant. Many agreements are part of the bail transaction yet not enumerated in Section 41-1042. Section 41-1042 only applies to agreements that set forth a "charge" or "money or other valuable consideration" for the bail agent's "service in a bail transaction." The Indemnity Agreement neither constitutes valuable consideration for the bail agent's service in the bail transaction nor describes charges for that service. As such, Section 41-1042 does not apply to the Indemnity Agreement and the DOI erred in concluding otherwise.
>
> The Respondent broadly defines "valuable consideration" and then urges that because the agreement to reimburse apprehension costs fits that definition and is not enumerated, it is precluded. Respondent's Brief pg. 7. However, bail agents require the defendant to agree to any number of conditions that fit this sweeping definition of valuable consideration, including the agreement to appear in court, to be monitored, to submit to supervised bail, to provide a third party guarantor and to reimburse the bail agent or surety for the amount of any forfeiture.

C.R. p. 115.

The agreement to pay the face amount of the bond, to appear in court, and to participate in supervised bail are bargained for contractual terms by the promisee given in exchange for Aladdin's agreement to post the bond to secure the defendant's release. In other words, these terms are no less "valuable consideration" as defined by the DOI than the agreement to reimburse apprehension costs. *See* Respondent's Brief, p. 11-12. And none of these terms is enumerated as an allowable "charge" pursuant to Section 41-1042. These terms are not precluded by that section, however, because although "valuable consideration" negotiated during the bail transaction, such terms are not valuable consideration charged for the bail agent's service in the bail transaction.

The DOI does not dispute the appropriateness of a bail agent requiring such consideration as a condition of the bail bond even though none of the foregoing are specifically enumerated in the statute. Terms of the bail bond agreement, including a promise to pay the forfeited amount of the bond and a promise to pay apprehension expenses, do not constitute a "charge" or attempt to "collect money or other valuable consideration" for the bail agent's service in the bail transaction. Section 41-1042 does not apply to indemnity agreements such as that set forth in Paragraph Three.

2. Section 41-1042's collateral provision further demonstrates that the DOI's interpretation of this statute is unreasonable

Idaho Code § 41-1042 permits bail agents to "collect money or other valuable consideration" to "provide collateral" to secure the bail bond, so long as the collateral is not excessive in relation to the face amount of the bond. Idaho Code § 41-1042(1)(b); *see also* §§ 41-1038(2), 41-1043. If Section 41-1042 precluded bail agents from contracting for remedies in

the event of breach, there would be no reason to collect collateral. Instead, by expressly permitting bail agents to take collateral from the consumer to protect against contingent losses, the statute contemplates that the parties will negotiate breach remedies during the bail transaction.

The DOI asserts that collateral accepted in connection with the bail bond transaction is solely for reimbursement of penal amounts paid to the courts in the case of forfeiture of the bail bond. *See* IDAPA 18.01.04.016.03. However, Idaho Code § 41-1042 does not limit the contracted losses to which a bail agent may apply collateral. As noted above, it is inconsistent to conclude that bail agents may accept some "valuable consideration" that is not enumerated in Section 41-1042 (such as the agreements to reimburse the forfeiture and to provide a third party indemnitor) but preclude agreements to reimburse apprehension expenses incurred to avoid forfeiture or have the forfeiture set aside.

To the extent that the contingent agreement described in the Third Paragraph is "valuable consideration" charged for the bail agent's service in a bail transaction, it must be construed as a form of collateral expressly permitted by Idaho Code § 41-1042(1)(b). The DOI responds that the Third Paragraph cannot be construed as collateral because it is not property and is not given to secure the bail bond. Even if the Indemnity Agreement is not the type of property that is normally contemplated as collateral, it secures the validity of the defendant's promise to appear in court and, thus, more closely resembles a form of collateral than a charge for the bail agent's service in the bail transaction

In arguing that the Third Paragraph cannot be "collateral" because it is not "property of any kind," the DOI contends that Aladdin is implicitly contending that the Third Paragraph is a

form of promissory note. Respondent's Brief, p. 14. Again, the DOI argues against a position that Aladdin has not taken. In its brief to the district court, the DOI also argued that Aladdin had implicitly argued that the Third Paragraph is a "promissory note." In reply, Aladdin indicated that it "has not contended that the Indemnity Agreement is a promissory note and, indeed, has consistently described the agreement as the agreement to pay expenses only in the event of a contingency – the defendant's breach of his or her obligations." C.R. p. 118. It is perplexing that the DOI continues to assert Aladdin contends that Paragraph Three is a promissory note.

Further, the Third Paragraph fits within the DOI's proffered definition of security – it provides Aladdin with "recourse" that "secures . . . the performance of an obligation." Respondent's Brief, p. 15, *citing In re: Wiersma*, 283 B.R. at 305. The Indemnity Agreement is given to secure the bail bond and give validity to the defendant's promise to appear in court. Thus, the agreement more closely resembles a form of collateral than a charge for the bail agent's service in the bail transaction even if the agreement is not the type of property that is normally contemplated as collateral. Therefore, if the Third Paragraph is construed as "valuable consideration" charged for the bail agent's service in a bail transaction, then it must be considered a form of collateral.

3. The Idaho Legislature would not have adopted a statute that thwarted the purpose of bail and created grave public safety issues

a. permitting the recovery of apprehension costs is consistent with the purpose of bail and public policy and the DOI's concern over protecting the bail consumer from unreasonable investigation costs is not compelling

Agreements such as Paragraph Three further the public policy underlying bail bonds including the return of fugitives to custody. Thus, even if Section 41-1042 was ambiguous

giving rise to the need to construe legislative intent, such intent reinforces the conclusion that contingent remedies in the event of breach fall outside the statute's scope.

The DOI responds that "in order to provide a uniform and consistent regulatory framework and to protect retail consumers, the Legislature enacted law which prohibits certain charges or collection of other valuable consideration in bail transactions except for certain permitted charges including premium, collateral, and certain actual expenses." Respondent's Brief, p. 17. However, the DOI's proffered interpretation of Section 41-1042 neither furthers legislative intent in enacting the statute nor protects the consumer.

Initially, the legislative findings the DOI cites in its brief to this Court do not pertain to the statute at issue, which was enacted in 2003, and instead pertains to the legislature's findings in enacting a different statute in 2010. Section 41-1042 was enacted along with a number of other sections to "address differences between insurance producers and bail agents including the collection and accounting of collateral, record keeping requirements, and allowable charges and fees." 2003 Idaho Sess. Laws Ch. 104 (Statement of Purpose). The findings cited by the DOI were part of 2010 statutory amendments which clarified the DOI's authority to license bail agents. Respondent's Brief, p. 16, *citing* 2010 Idaho Sess. Laws at 165. Section 41-1042 was not amended with this legislation. *See* 2010 Idaho Sess. Laws Ch. 86. The legislative findings cited by the DOI do not support its contention that the legislature enacted Section 41-1042 "in order to provide a uniform and consistent regulatory framework and to protect retail consumers."

Moreover, as noted in Aladdin's opening brief, if bail agents could not recover investigation costs, yet could recover the amount of the forfeited bond (which it is undisputed that bail agents may do), bail agents would have no financial incentive to locate and return a

criminal defendant to court. Compromising public safety by permitting the criminal fugitive to remain free would be contrary to the bail bond's purpose of ensuring the defendant's appearance in court.

The DOI does not directly respond to these points and instead broadly asserts that an agreement for recovery of apprehension costs as a condition of the bail transaction is contrary to the Legislature's expressed intent to protect consumers. Respondent's Brief, p. 19. To support its conclusion, the DOI notes that the terms of Paragraph Three do not provide a limitation of apprehension expenses except that no apprehension expenses are chargeable after the entry of Judgment. *Id.* at 20.

That there is not express statutory limitation on a bail agent's ability to recover apprehension expenses does not evidence an intent by the legislature to preclude the recovery of such expenses. As previously noted, the record does not reflect any instances where a bail agent has attempted to collect unreasonable apprehension fees and, if a bail agent did pursue collection of unreasonable apprehension costs, the consumer would have a defense to payment of these costs. Appellant's Brief, p. 19, *citing Saladino v. Stuyvesant Ins. Co.*, 39 A.D.2d 765 (N.Y. App. Div. 1972) (holding $4,000 investigation fee was unreasonable as the principal was residing with his wife without any attempt at concealment and working at his regular employment).

Additionally, the DOI agrees that bail agents can require an indemnitor to post collateral at the time of the bail transaction to secure the *entire* amount of the bail bond. The DOI has not explained how an additional promise – secured or unsecured – to reimburse Aladdin for apprehension expenses incurred in returning an absconder to court and avoiding forfeiture exposes the defendant or his indemnitor to additional risk of injury. Rather, indemnity

agreements concerning apprehension expenses often *protect* the consumer by providing Aladdin and other bail agents with an incentive to re-capture the defendant and obtain exoneration of the bond, rather than simply letting the forfeiture stand and collecting the entire amount of the bond from the indemnitor or defendant. Moreover, consumers have a choice in which bail agent to use. If a consumer elects to use Aladdin's services, Aladdin requires indemnitors to agree to be contractually liable for the apprehension expenses incurred in returning the defendant – now a criminal fugitive – to custody. It cannot reasonably be argued that a consumer is harmed when he or she has made the voluntary determination to engage the services of Aladdin and agreed to indemnify Aladdin in the event the agreement is breached.

b. the DOI's suggestion that apprehension cost be negotiated after the breach has occurred is unrealistic and harmful to the public and consumer

Aladdin argued that the DOI's position that the bail agents should negotiate recovery of apprehension costs after the breach has occurred is unrealistic and harmful to the public and consumer. The DOI does not respond to this point but notes that in the "Hearing Officer's Findings, Conclusions, and Final Order on Request for Declaratory Ruling (A.R., pp. 109-123), she explains well the effect and public policy issues of entering into the indemnity agreement after the bail transaction has been completed." Respondent's Brief, p. 18. The cited portion of the record actually sets forth the DOI Director's findings, not those of the hearing officer. *See* A.R. 69-78 (Hearing Officer's Findings of Fact, Conclusions of Law and Preliminary Order).[1]

[1] The DOI also mistakenly cites Aladdin's original request for declaratory ruling in its brief to this Court by indicating Aladdin asked the DOI to declare that Idaho Code § 41-1042 does not preclude indemnity agreements at the time of the bail transaction which permit recovery of "actual expenses later incurred *ir (sic)* connection with the apprehension and surrender of a criminal defendant who has failed to appear as required in court." Respondent's Brief, p. 5 (emphasis added). The original document actually reads "later incurred in connection" and the

Further, as Aladdin explained in its opening brief, negotiating breach remedies after the transaction is inherently problematic. Appellant's Brief, p. 17-18. For instance, no bail agent is going to investigate an absconding defendant's whereabouts for the purpose of negotiating the recovery of already incurred investigative expenses with that defendant – and no absconding defendant is going to agree to reimbursement of these expenses absent a prior agreement. It is unrealistic to expect that a bail agent and a third party indemnitor will sit down at the table again after the breach has occurred and work out the breach remedies including the apprehension costs the indemnitor will pay. A bail agent who can simply collect the face amount of the bond from that indemnitor is unlikely to undertake the time and expense of attempting to negotiate the recovery of apprehension expenses after a defendant has failed to appear. Under this scenario, the fugitive remains free to the detriment of the general public as well as the consumer/ indemnitor who otherwise may benefit financially by paying lower apprehension costs rather than the full penal sum of the bond.

Thus, the DOI Director's finding that "the goals of encouraging recovery and ensuring the presence of the defendant at court hearings are preserved" by permitting a bail agent to seek to enter an agreement for recovery of the defendant after the bail transaction is unrealistic. *See* A.R. p. 118-19. Similarly, the DOI Director's finding that "mandating a separate agreement for apprehension costs with the bail transaction not conditioned upon its validity or existence protects an indemnitor from potentially unscrupulous and unfair practices of incurring apprehension costs that an indemnitor could argue were unnecessary or excessive" is

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DOI apparently bases its indication of "ir (sic)" on the fact that part of the "n" did not fully copy on the Agency Record prepared for this Court.

unreasonable. As noted above, the common law provides indemnitors with a defense to excessive apprehension expenses. Further, the DOI could easily address its concerns regarding excessive apprehension expenses by simply promulgating rules that clarified that such expenses cannot be excessive in relation to the face amount of the bond or requiring that contracts concerning such reimbursement include additional detail.

Interpreting Section 41-1042 as precluding agreements for reimbursement of any apprehension expenses at the time of the bail transaction thwarts public policy by discouraging bail agents from recovering fugitives. This risk is not ameliorated by the unrealistic option of negotiating breach remedies after the bail transaction and such a drastic solution is unnecessary to protect consumers against reimbursement for excessive expenses.

c. permitting the recovery of apprehension costs is consistent with the Legislative history of Idaho Code § 41-1042, Idaho Supreme Court precedent, and the DOI's position regarding the recovery of apprehension costs is novel and unsupported by authority from other jurisdictions

In its opening brief, Aladdin argued that Idaho Code § 41-1042's legislative history establishes that the Idaho Legislature did not intend to preclude indemnity agreements permitting the recovery of apprehension costs such as that contained in the Third Paragraph. Appellant's Brief, p. 22. Aladdin also noted that the Idaho Supreme Court recognized that bail agents may recover expenses pursuant to the terms of an indemnity agreement in *Martin v. Lyons*, 98 Idaho 102, 105, 558 P.2d 1063, 1066 (1977). *Id.* at 23. Aladdin cited authority from multiple jurisdictions that recognize bail agents' ability to contract for the reimbursement of reasonable apprehension expenses. *Id.* at 24-26. Aladdin noted that the DOI's position is novel and altogether inconsistent with the statutory, regulatory and case laws of other jurisdictions

throughout the United States. *Id.*

The DOI does not respond to these arguments or offer any authority demonstrating that such charges should be precluded.

4. The DOI's promulgation of a new rule purporting to implement Section 41-1042 does not change this Court's analysis

The existence of the DOI's rule, which it promulgated while this action was pending to implement its interpretation of Section 41-1042, does not alter this Court's inquiry in this appeal. *See also* Appellant's Brief, p. 27-29. In its brief to this Court, the DOI cites the Idaho Administrative Procedure Act provisions concerning legislative review of rules and asserts that its rule "provides further interpretation and guidance on allowable bail agent charges and fees" that it regulates. Respondent's Brief, p. 21.

The Idaho Administrative Procedure Act provides that:

> The standing committees of the legislature *may* review temporary, pending and final rules which have been published in the bulletin or in the administrative code. *If* reviewed, the standing committee which reviewed the rules shall report to the membership of the body its findings and recommendations concerning its review of the rules. *If* ordered by the presiding officer, the report of the committee shall be printed in the journal. A concurrent resolution *may* be adopted approving the rule, or rejecting, amending or modifying the rule where it is determined that the rule violates the legislative intent of the statute under which the rule was made, or where it is determined that any rule previously promulgated and reviewed by the legislature shall be deemed to violate the legislative intent of the statute under which the rule was made.

I.C. § 67-5291 (emphasis added).

That a legislative committee may have reviewed the DOI's rule implementing its interpretation of the statute does not provide this Court further guidance regarding the propriety of that interpretation. Of course, subsequent action or inaction by a legislative committee is not

relevant to determining legislative intent at the time a statute was passed. *See Gillihan v. Gump*, 140 Idaho 264, 268, 92 P.3d 514, 518 (2004), *abrogated on other grounds by Gonzalez v. Thacker*, 148 Idaho 879, 231 P.3d 524 (2009) (post-enactment statements of legislators are not part of the record that are considered the contemporaneous "history" that is appropriate for courts to consult). Further, the validity of a rule – like the validity of the DOI's interpretation of the statute in response to Aladdin's request for a declaratory judgment – is subject to judicial review. *See* I.C. § 67-5278 (validity of rule can be determined in an action for declaratory judgment in the district court and such a declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass upon the validity of the rule in question). It is this Court's responsibility to determine the validity of rules. *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001).

The Rule promulgated by the DOI while the instant action was pending simply sets forth the DOI Director's interpretation of Section 41-1042 as described in the Final Order. *Compare* A.R. p. 120-22 (Final Order) *with* IDAPA 18.01.04.016. The DOI cannot strengthen its position in this litigation by memorializing its position in an administrative rule and then noting a legislative committee reviewed the rule and failed to alter it before it became effective.

The DOI's new rule is only valid to the extent its interpretation of Section 41-1042, as reflected in its Final Order, is correct. Section 41-1042 does not limit indemnity agreements such as that set forth in Paragraph Three and this Court should therefore reverse the DOI's erroneous interpretation of Section 41-1042 irrespective of the foregoing rule. This Court should exercise its ultimate responsibility to construe legislative language by determining that Section 41-1042 does not limit indemnity agreements such as that described in Paragraph Three.

B. Substantial Rights of Aladdin Are Prejudiced By the DOI's Declaratory Ruling

In its opening brief, Aladdin noted that the DOI's declaratory ruling specifically concerns the Indemnity Agreement for Surety Bail Bond utilized by Aladdin to transact business and forbids Aladdin from utilizing that agreement. Since Aladdin is financially harmed by this declaratory ruling, its substantial rights are prejudiced within the meaning of Idaho Code § 67-5279(4). The DOI has not disputed that Aladdin's substantial rights are effected by its Final Order.

III. CONCLUSION

Based upon the foregoing and the arguments set forth in the Appellant's Brief, this Court should reverse the Final Order because the DOI's declaration that Idaho Code § 41-1042 precludes Aladdin from entering into an indemnity agreement at the time of a bail transaction which permits collection of apprehension costs later incurred should a criminal defendant fail to appear as required is unreasonable and prejudices Aladdin's substantial rights.

Respectfully submitted this 28th day of December, 2011.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

By _____
Scott McKay

CERTIFICATE OF SERVICE

I CERTIFY that on December 28, 2011, I caused a true and correct copy of the foregoing document to be:

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